

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FRANK ORTEGA

Claimant

VS.

KAW VALLEY ELECTRIC

Respondent

AND

FEDERATED RURAL ELECTRIC INS.

Insurance Carrier

Docket No. **1,037,644**

ORDER

Respondent and its insurance carrier request review of the January 6, 2011 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on April 5, 2011.

APPEARANCES

John Ostrowski of Topeka, Kansas, appeared for the claimant. Jeffery Brewer of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties stipulated that claimant's upper extremity injury resulted in a 22 percent scheduled disability to his left forearm.

ISSUES

It was undisputed that claimant suffered a work-related injury. But the parties could not agree on the nature and extent of disability he suffered. Claimant alleged permanent impairment to his wrist and neck as well as a psychological impairment. Respondent argued claimant's permanent impairment was limited to a scheduled disability to his left forearm.

The Administrative Law Judge (ALJ) awarded claimant compensation for not only a 22 percent permanent partial scheduled disability to the left forearm but also a separate

award for a 15 percent functional impairment to the body as whole due to psychological impairment.

Respondent requests review of the nature and extent of disability. Respondent argues that because the injury was to a scheduled member the language of K.S.A. 44-510d limits disability compensation to the scheduled injury and there cannot be additional disability compensation paid for the secondary psychological injury. Respondent further argues that impairment rating percentages for psychological impairment are not contained in the *AMA Guides*¹ and since whole body functional impairments must be based on that publication, there cannot be an award for a psychological functional impairment. Consequently, respondent concludes claimant's compensation should be limited to an award for a scheduled disability to claimant's left forearm.

Claimant argues it is well established in Kansas that a secondary injury that flows from the initial injury is compensable and the uncontradicted evidence established that claimant suffered permanent psychological impairment as a result of his work-related injury. Claimant further argues psychological impairments are contained within the *AMA Guides* and the fact that percentages of impairment are not provided does not preclude a rating and compensation for such injuries. Finally, claimant argues that he is entitled to compensation for a single whole body impairment combining the ratings provided for his left wrist, neck and psychological impairment.

The sole issue for Board determination is the nature and extent of disability, specifically whether claimant is entitled to compensation for a whole body impairment or limited to compensation for a 22 percent scheduled disability to his left forearm.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

Briefly stated, on February 28, 2003, as claimant was performing his job duties for respondent he slipped on ice and as he fell he attempted to catch himself with his left hand. Claimant had an immediate onset of pain and swelling. Treatment has included

¹American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

epidural injections, medication, physical therapy and exercises. Claimant has also had four separate surgical procedures performed on his left hand/wrist. None of the surgeries relieved the ongoing pain and swelling in his left hand. Because of the ongoing pain claimant developed anger and frustration over his condition as well as depression.

It is undisputed that as a result of his accidental injury the claimant has suffered a 22 percent scheduled disability to his forearm. And claimant has continued to work for respondent with accommodation. Claimant is right-hand dominant and the injury was to his left wrist.

But claimant also alleged that he suffered permanent impairment to his cervical spine as well as a psychological impairment. Claimant complained of pain that would radiate into his neck with increased activity. At the request of claimant's attorney, Dr. P. Brent Koprivica, board certified independent medical examiner, examined and evaluated claimant on March 8, 2010. The doctor assigned a 5 percent whole person impairment due to involvement of the cervicothoracic spine and left shoulder girdle which placed claimant in the DRE Category II. Dr. Koprivica based his rating on loss of motion. Conversely, claimant was examined by Dr. Peter Bieri on May 27, 2010, pursuant to the ALJ's Order for an independent medical examination. Dr. Bieri's physical examination of claimant did not detect any visible or palpable muscle spasm in the cervical spine and active range of motion was full and unrestricted. And the range of motion of the left shoulder was also full and unrestricted. Dr. Bieri concluded claimant failed to meet the criteria for any impairment to the cervicothoracic spine or left shoulder attributable to the work-related accident.

Claimant argues that with intermittent pain his cervical range of motion is decreased which would then meet the criteria for a permanent impairment. Dr. Bieri testified:

Q. Okay. And that pain could cause some decrease in the cervical range of motion although you did not find it on your examination?

MR. BREWER: Well, I object, again, lack of foundation. The doctor hasn't testified a causal relationship between anything in the neck related to the wrist injury.

MR. OSTROWSKI: I think he just did.

Q. Go ahead, Doctor.

A. I don't know that you can make a legitimate stretch from the wrist to the neck. I think you can up to the level of the shoulder. The nerves involved in entrapment neuropathy form distal to the brachial plexus which is in the -- at the shoulder level. There are some reports that you can actually have neck pain as the result of peripheral entrapment neuropathy. In this instance the mechanism you've

described I could not say within reasonable probability was causing his neck pain. In summary, I don't know why his neck hurts.²

The ALJ found Dr. Bieri's opinion more persuasive than Dr. Koprivica and concluded claimant had failed to meet his burden of proof that he suffered permanent impairment in the cervical spine. The Board agrees and affirms.

Dr. Robert Barnett, a clinical psychologist, examined and evaluated claimant on March 7, 2008, at claimant's attorney's request. The doctor took a history from claimant which included his educational, vocational background and experience. Dr. Barnett performed two psychological tests on claimant to determine his anti-brain dysfunction or learning disabilities and personality inventories. The doctor diagnosed claimant as having dysthymic disorder which is depression with loss of interest in pleasurable activities. Dr. Barnett recommended psychotherapy, pain management, psychotropic medications, specifically antidepressants. The doctor opined that claimant's psychological diagnosis and impairment rating could improve with treatment.

Dr. Barnett testified:

Q. Did you relate the depression, what I'll call this level two depression, to his work-related injury occurring back in February of 2003?

A. Yes, my clinical opinion, it's related to his injury. His work injury.

Q. And how does one make that determination when they are sitting at your end of the desk, other than the patient simply saying "I think this is work-related"?

A. He's experienced several losses as a result of his work-related injury, and one is loss of function with his hand and also chronic pain. It also -- secondary to that, he's lost his ability to participate in some of his usually enjoyable activities and, as he said in the interview, at work even though he continues to work he feels useless and like he is not pulling his weight. These are all statements that are consistent with the onset of depressive symptom secondary to an injury.³

Dr. Barnett explained how he got the impairment rating:

Using the Fourth Edition of the AMA Guides particularly specifically the Behavioral and Mental Disorders, it's my opinion he has experienced Class II: Mild Impairment. Taking the impairment from the Fourth Edition and applying it to the Second Edition,

² Bieri Depo. at 20.

³ Barnett Depo. at 9.

which yields the percentage of impairment, I estimated 10 to 20 percent impairment.⁴

Dr. Barnett testified that the Fourth Edition does not allow for an assignment of a specific percentage of functional impairment for psychological injuries.

Respondent argued in its brief to the Board that because the claimant initially just injured his left wrist in the February 28, 2003 accident that his compensation is limited to a scheduled disability. The Board disagrees. As a result of claimant's left wrist injury he underwent four separate operations which failed to alleviate his ongoing pain. And because of the pain in his left wrist it was Dr. Barnett's uncontradicted testimony that claimant developed dysthymic disorder, late onset, a psychological impairment. It is well established that where the causation of the second injury is linked to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury.⁵ And in the determination of whether the claimant has sustained a scheduled or a non-scheduled disability it is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available.⁶

Simply stated, the Kansas Supreme Court has held that if the injury is both to a scheduled member and to a nonscheduled portion of the body, the disabilities should be combined and compensation should be awarded under K.S.A. 44-510e.⁷ Because claimant's psychological condition was a natural and probable consequence of the accidental injury to his hand, the Board finds claimant is entitled to compensation for a whole body disability for his accidental injury that occurred on February 28, 2003.

Respondent next argues that impairment rating percentages for psychological impairment are not contained in the *AMA Guides* and since whole body functional impairments must be based on that publication, there cannot be an award for a psychological functional impairment.

Because claimant continues to perform a comparable wage job with respondent he is limited to an award based upon the percentage of his functional impairment.⁸ Functional impairment is defined by K.S.A. 44-510e(a) as follows:

⁴ Barnett Depo. at 10.

⁵ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

⁶ *Bryant v. Excel Corporation*, 239 Kan. 688, 722 P.2d 579 (1986); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

⁷ See also *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

⁸ K.S.A. 44-510e(a).

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The ALJ addressed respondent's argument in the following fashion:

From the comments of respondent's counsel during the regular hearing and during the deposition evidence, the position of the employer in regard to claimant's psychological impairment seemingly is that claimant cannot be assessed functional impairment under K.S.A. 44-510e because the *AMA Guides to the Evaluation of Permanent Impairment 4th Edition* do not provide for specific percentages of impairment for psychological conditions.

However, the statute clearly restricts the rater to using the 4th Edition only "if the impairment is contained therein." Dr. Barnett used the 2nd Edition of the same *AMA Guides to the Evaluation* [sic] of Permanent Impairment which provided a range of 10-20 percent impairment to the body as a whole for claimant's condition. Dr. Barnett's rating was "competent medical evidence" and was the only psychological rating submitted.⁹

The connection between claimant's physical injuries suffered in this matter and his psychological problems which developed is well established in this record. The only dispute surrounds the assessment of an impairment for that condition. Dr. Barnett opined claimant suffered a 10-20 percent whole body impairment for the psychological condition, citing the second edition of the *AMA Guides*. However, statutorily the fourth edition is the version required by the legislature under K.S.A. 44-510e. The statute requires the use of the fourth edition **if the impairment is contained in the fourth edition**. Here, Dr. Barnett testified that the fourth edition does not provide a percentage of functional impairment for a psychological condition.

In workers compensation litigation, the fact finder must reach a determination as to the level or percentage of impairment, both physical and psychological. Without a number value, the measurement of a claimant's impairment cannot be determined under the Act. The Board finds that Dr. Barnett's use of the second edition does not violate the statutory restrictions requiring the use of the fourth edition. To so narrowly interpret the statute would prevent the determination of a functional impairment for psychological disabilities. If the legislature had intended to eliminate psychological impairments, it would have done so. The Board affirms the ALJ's determination that claimant suffered a 15 percent whole body disability from the psychological impairment.

⁹ ALJ Award (Jan. 6, 2011) at 3.

The ALJ awarded compensation for the scheduled injury and also separate compensation for the whole body injury. The ALJ noted:

While there is a combined rating cited for the psychological and scheduled injuries, the Court would note the Kansas Supreme Court stated in *Casco v. Armour-Swift Eckrich*, 283 Kan. 508, 522, syl. 7 (2007), "If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d." Combining a scheduled injury to claimant's upper extremity with a whole body injury to arrive at whole body impairment is counter to the dictates of *Casco*, op. cit., and therefore the awards for each injury will be calculated separately.¹⁰

The Board disagrees. Initially, it should be noted that *Casco* is factually distinguishable. In *Casco* there were scheduled injuries to each shoulder whereas this case involves a scheduled injury to the wrist and a non-scheduled psychological impairment. As previously noted, in *Bryant*¹¹, the Kansas Supreme Court stated the general rule:

If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

Thus, as in this case, where there are injuries to both a scheduled member (forearm) and to a nonscheduled portion of the body (psychological), the disabilities should be combined and compensation should be awarded under K.S.A. 44-510e.¹²

Dr. Koprivica testified that to convert an upper extremity rating to a whole body rating you multiply the upper extremity rating by 60 percent. Accordingly, the claimant's 22 percent rating would result in a 13 percent whole body rating. The Combined Values Chart of the *AMA Guides* provides that a 13 percent rating (forearm) combines with a 15 percent rating (psychological) for a 26 percent whole body functional impairment. The claimant has met his burden of proof to establish that he suffers a 26 percent whole body functional impairment.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated January 6, 2011, is modified to provide one award of

¹⁰ *Id.* at 4.

¹¹ *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

¹² See also *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

compensation for a 26 percent whole person functional impairment and affirmed in all other respects.

Claimant is entitled to 107.90 weeks of permanent partial disability compensation at the rate of \$432 per week or \$46,612.80 for a 26 percent functional disability, making a total award of \$46,612.80 which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this 13th day of May, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John Ostrowski, Attorney for Claimant
Jeffery Brewer, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge